



**PARTNERSHIP FOR PUBLIC SERVICE**

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Prepared for

**The Senate Committee on Veterans Affairs**

**Hearing on Pending Legislation**

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Chairman Isakson, Ranking Member Blumenthal, and Members of the Committee, thank you for the opportunity to appear before you today. I am Max Stier, President and CEO of the Partnership for Public Service, a nonpartisan, nonprofit organization dedicated to revitalizing the federal civil service and transforming the way government works. I appreciate your invitation to testify on legislation pending before this Committee, specifically, the *Department of Veterans Affairs Accountability Act of 2015* (S. 1082) and the *Ensuring Veteran Safety through Accountability Act of 2015* (S. 1117).

The Partnership is one of the most vocal and passionate proponents of reforming our civil service system, and we issued a report<sup>1</sup> last year outlining a framework to improve the management and performance of the federal workforce across government. However, the reforms being promoted in some of the bills before the Senate Veterans Affairs Committee will do more harm than good. Rather than simply finding ways to fire federal employees faster, the focus of legislative reform must be on how we can serve our veterans better. There are a number of ways to reform our system and improve service to the veteran community, but moving to an “at-will” employment system for the Department of Veterans Affairs is not one of them.

There are important differences between the federal government and the private sector. To start, the top leaders in government are selected for political reasons and typically valued for policy expertise, rather than management capability. Those leaders are not usually held accountable for poor management, and they should be.

But neither should they be permitted to fire employees at will. Our nation experienced a long and unfortunate period of “at-will” employment at the federal level which amounted to a corrupt spoils system. It took the assassination of a president and an angry public to move us to a merit-based system.<sup>2</sup> Changes to current law must be made carefully, thoughtfully and with high regard for merit and competence. That is why today’s hearing is so important, and so needed.

The Partnership strongly agrees that poor performance is a real problem, and we agree that federal employees should be held accountable for their performance and conduct. Employees themselves cite poor performers as a serious issue: Partnership analysis of the 2014 Federal Employee Viewpoint Survey found that just 26.3 percent of employees at VA believe that steps are taken to deal with poor performers who cannot or will not improve. But ultimately, we believe that perhaps the biggest contributor to the performance problems at the VA is the quality of the management, rather than the quality of the system. While the government’s management systems can and must be improved, changing the system alone will not produce the desired results.

You asked me to provide feedback today on pending legislation; however, first I would like to share the Partnership’s suggestions for actions that this Committee, and the Congress as a whole, can take to address the underlying problems with our civil service system and the barriers to attracting, hiring, developing, managing and retaining the very best talent. We believe these recommendations for reform will ultimately enable the Department of Veterans Affairs and the federal government to provide better service and to operate more efficiently and effectively.

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<sup>1</sup> Partnership for Public Service and Booz Allen Hamilton, *Building the Enterprise: A New Civil Service Framework*, April 2014, <http://ourpublicservice.org/publications/viewcontentdetails.php?id=18>.

<sup>2</sup> Title 5 U.S. Code § 2301 “Merit System Principles,” <https://www.law.cornell.edu/uscode/text/5/2301>.

## Recommendations

### *Treat Government as an Enterprise*

Government agencies operate as separate, largely independent organizations; only in times of crisis are resources from multiple agencies leveraged to address a single problem. But today's challenges – such as providing timely and high-quality care for veterans – are complex, and can rarely be resolved effectively by one agency acting alone. The Partnership and Booz Allen Hamilton issued a report in 2013 titled, *Building the Enterprise: Nine Strategies for a More Integrated, Effective Government*.<sup>3</sup> In the report, we advocate for a collaborative, multi-agency approach that integrates and leverages the enterprise – that is, the whole of government – to solve today's complex challenges. Encouraging an enterprise approach is one way that Congress can respond to the fragmentation and overlap that continue to exist across agencies and programs. Common-sense solutions like leveraging federal buying power or sharing mission-support services are possible when we build government's capacity to plan, manage and measure cross-agency goals and missions. There are real opportunities, for example, to better integrate health systems at the Departments of Defense and Veterans Affairs, and ultimately achieve better outcomes.

### *Civil Service Reform*

In no area is this need for a unified, whole-of-government approach more critical than in the way government manages talent. Our civil service system was established over 120 years ago. It governs more than two million workers and is a relic of a bygone era, reflecting a time when most federal jobs were clerical and required few specialized skills, and when the federal government's role in society was smaller and far less complicated. The world has changed dramatically, but the civil service system has remained stuck in the past, serving as a barrier rather than an aid to attracting, hiring and retaining highly skilled and educated employees needed to respond to today's domestic and global challenges. As previously mentioned, the Partnership and Booz Allen Hamilton released a report last year which creates an overarching strategy for reforming our civil service system, and includes recommendations for Congress and the administration on reforming pay and classification, hiring, performance management and strengthening senior leadership in government.

We know that civil service reform is ambitious and it will require significant time and sustained attention, but we believe it is critical and deserves such deliberation. In the absence of comprehensive reform, we believe there are a number of actions that can be taken in the near term that will ultimately improve performance and management at VA and across government. Some of these actions fall into the category of good human resources or workforce management policies and practices.

#### *1) Select Agency Leaders with Management Experience, Create Term Appointments and Improve the Presidential Transition Process*

Agency leaders must be more than policy or technical experts. They must be equipped to manage and lead their agency. The administration should nominate leaders with management experience, and this Committee, as it participates in the confirmation process, is in a position to ensure that future leaders

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<sup>3</sup> Partnership for Public Service and Booz Allen Hamilton, *Building the Enterprise: Nine Strategies for a More Integrated, Effective Government*, August 2013, <http://ourpublicservice.org/publications/viewcontentdetails.php?id=28>.

at VA demonstrate these capabilities. We also urge the Committee to exercise its oversight role and ensure continued focus on departmental management.

In addition, Congress could consider making the Secretary of VA a five-year term appointment, similar to the position of IRS Commissioner, with a performance contract to ensure continuity between administrations and a continued focus on solving long-term management problems. Similarly, Congress could convert certain management-oriented political appointments to career positions, for example C-Suite positions such as chief financial officers, chief human capital officers, chief information officers and the chief acquisition officers, with fixed terms and performance contracts. In addition to promoting greater continuity and attention to management challenges, such a change would also help retain institutional knowledge and relieve some of the burden on the complex and time-consuming political appointments process. The Committee should also examine the compensation provided to individuals in these key positions; while pay is not the primary motivator for the vast majority of individuals considering public service positions, given the level and scope of responsibilities, current pay levels seem significantly inadequate compared to those offered in the private sector.

Finally, Congress should pass S. 1172, *The Edward “Ted” Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015*, which is intended to improve knowledge sharing between the outgoing administration and the incoming president’s team, ensure agencies are adequately prepared for leadership vacancies, and provide accountability for transition activities across the federal government – all critically important for an agency like the Department of Veterans Affairs. This legislation was introduced by Senators Tom Carper and Ron Johnson, and ordered reported by voice vote in the Senate Homeland Security and Governmental Affairs Committee last month.

## 2) *Hold Leaders Accountable in Performance Plans for Managing their Agency*

Accountability for management in government starts at the very top. Senior agency leaders, as well as career and political executives, should be held accountable for recruiting and selecting the right talent for their agency, engaging and motivating those employees, training and developing their people and preparing them for future leadership roles, and holding managers accountable for making tough decisions, especially with respect to performance. We recommend Congress require all political appointees at VA, and across government, to have annual performance plans, similar to those required for career employees, and have a transparent assessment of whether they are meeting their goals.

## 3) *Create new Tools to Hire the Right People*

If agencies are able to select and hire the right people with the right skills this will hopefully minimize performance issues down the line. In our civil service reform report we outline a series of hiring reforms that we believe would make it easier for agencies to attract the very best talent. For example, we recommend expanding to all agencies the use of flexibilities now available only to certain “excepted” agencies, which can be achieved without compromising core principals such as veterans’ preference, merit-based selection, diversity and equal opportunity.

In addition, agencies should be allowed to share their lists of best-qualified talent with one another. For example, if VA needs to hire a medical professional in a particular area and is having difficulty finding the best talent, the agency could get access to the best-qualified list for a similar position at another department. Senators Jon Tester, Rob Portman, Ben Cardin, Jerry Moran and Heidi Heitkamp recently introduced the *Competitive Service Act*, which would give agencies this authority. We urge Congress to pass this legislation.

We also urge Congress to consider legislation that would permit former high-performing federal employees to be non-competitively reinstated into government service at levels that match their skills and experience. Currently, a former federal employee would only be able to return to government non-competitively at the grade level last held in government, not the higher level for which he/she would likely qualify given the additional years of professional experience. This small change would make it easier for VA and other agencies to bring experienced talent back into government.

Creating these new hiring tools would be incredibly valuable, but even more importantly, HR staff and hiring managers must be knowledgeable about the hiring tools available and must be trained in how to use them.

*4) Invest in Training Managers and Hold them Accountable for Addressing Performance; Create a Promotion Track for Technical Experts*

VA must focus on providing better training for new managers and supervisors so they are prepared to succeed, and must hold their managers accountable for managing employee performance. The process for removing or disciplining a federal employee is daunting in terms of the time and effort required, and this discourages some managers from taking appropriate action. Often managers are not trained in handling these situations and lack the will or the administrative and/or top-level support to act. They may have a legitimate concern about the personal toll and disruptive impact a removal may have on the work unit. Managers should be required to receive necessary training in how to effectively motivate, manage and reward employees, and how to deal effectively with poor performers; they also need access to effective assistance from their HR or General Counsel offices. They should also be held accountable in their performance plans for taking action to address poor performance or misconduct.

In addition, VA should create a separate promotion track so that technical experts can advance in their careers without having to go into management positions for which they may be ill-suited. Too often we hear that supervisors promote their employees to management positions because they want to be able to pay them more, even when the employees are technical experts and often uninterested or unskilled in managing people. There should be opportunities for advancement without having to become a manager.

*5) Better Utilize the Probationary Period*

In addition to providing more and better training, VA should better utilize the probationary period for employees new to government and employees who are new supervisors in the agency. The probationary period serves as a continuation of the assessment process and gives the manager a chance to determine further an individual's fitness for the position; individuals who have not demonstrated the competencies needed to perform well can be removed more easily during this period. As an employee's probationary period is coming to a close, we believe managers should be required to make an affirmative decision as to whether the individual has demonstrated successful performance and should continue on past the probationary period.

For new supervisors, who also serve in a probationary status, successful performance should include demonstrating management competencies in addition to technical skills. If an employee's supervisor decides not to pass them through probation, the employee would return to a nonsupervisory position, as is currently the case according to statute. Employees who are new to government should be required to demonstrate fitness for the position in order to continue in federal service. In the case that a manager decides the person is not fit for the position, he or she would be removed from federal

service. Managers should be held accountable in their performance plans for providing regular feedback to employees before making a decision on their probationary status.

*6) Review and Expedite Internal Processes for Dealing with Performance Issues*

In talking with federal leaders across government, we hear that many of the delays in dealing with performance and accountability happen at the agency level before an action is even taken. We believe much can be done administratively to streamline the process within the existing statutes. We recommend creating an interagency “swat team” that could review agency policies across government to determine how to speed up the internal process for addressing performance and misconduct issues. For example, the team could examine how managers are able to demonstrate that they have provided opportunities for their employee(s) to improve without putting them on a formal Performance Improvement Plan (PIP), which lengthens the time it takes to fire someone who may have already demonstrated they are not the right fit for the job. Once the team has determined best practices they could share those practices among all agencies.

*7) Consolidate and Expedite the Appeals Process*

The current federal process for dealing with employee complaints and appeals is fundamentally flawed and does not adequately serve the needs of either managers or employees. Federal employees have access to multiple and sometimes overlapping dispute resolution forums on a wide range of issues and it can routinely take over a year or more to receive a final answer, confusing both managers and employees and delaying resolution.

Greater accountability and workplace justice can be achieved by creating a one-stop shop that would simplify the employee complaint and appeal processes and expedite a final resolution of these cases to the benefit of both agency managers and employees. We recommend creating a single adjudicated body, a reconstituted MSPB that would handle all administrative appeals of agency decisions to remove or discipline employees that are currently filed with the MSPB and/or the EEOC. Such a body, if properly resourced, should be able to issue a decision within 90 days, on average.

## **Comments on Pending Legislation**

It is our belief that the legislation pending before the Senate Veterans Affairs Committee will not fundamentally improve performance and accountability at the Department of Veterans Affairs. Indeed, we believe that the legislation has the potential for harmful effects, including diminished protection for whistleblowers and little incentive for talented and experienced people to seek employment in the Department. We know through first-hand information that legislation passed by Congress last year<sup>4</sup> is having just such effect – i.e., the Department is finding it harder to attract the top-notch talent it needs to Senior Executive Service positions.

If the Committee chooses to move forward on the legislation discussed below, we believe several amendments are necessary to minimize potentially damaging effects. Our recommendations are described below.

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<sup>4</sup> Public Law 113-146.

Department of Veterans Affairs Accountability Act of 2015 (S. 1082)

*Removal or Demotion of Employee Based on Performance or Misconduct*

Section 2 of this bill would give the Secretary of Veterans Affairs total discretion to fire or demote employees. While we understand the intent is to expedite the process for demoting or removing someone from federal service who is failing to serve veterans effectively, we believe this will have several damaging, unintended consequences, including silencing whistleblowers and hindering VA from attracting and retaining talent.

We recommend providing some language to clarify the standard by which the Secretary can take an action to remove someone. A blanket removal for “performance,” left undefined, is too vague and could lead to removal for the wrong reasons.

Our understanding of the language in Section 2(f) “Limitation on Removal or Demotion” is that it was drafted with the intention of protecting employees who have already gone to the Office of Special Counsel (OSC) alleging the action was a prohibited personnel practice. While this is important, we are concerned that there is no recourse in this bill for individuals who have not already gone to OSC but who believe the action taken against them is a prohibited personnel practice. In other words, as written, there are no protections for whistleblowers or employees who believe they have been fired for partisan or other discriminatory reasons.

The lack of whistleblower protections is particularly important. According to Partnership analysis of the 2014 Federal Employee Viewpoint Survey, 46.2 percent of employees at VA do not currently believe they can disclose a suspected violation of any law, rule or regulation without fear of reprisal. Should this legislation pass without a provision protecting whistleblowers, we anticipate this number will increase significantly. The very people VA needs to help disclose mismanagement, fraud and abuse could refrain from speaking out. One could argue that access to an expedited MSPB appeal protects whistleblowers or individuals who believe the action taken against them was a prohibited personnel practice; however, the prospect of being fired before having any chance to respond to the charges would inhibit many employees from disclosing wrongdoing in the first place because once the action is taken, the person is removed from federal service and is no longer on the payroll. In the case that a whistleblower alleges retaliation as a result of an action taken by the Secretary, they would not have a venue to bring a claim if they do not do it within seven days from when the action is taken.

We would support retaining the provision to protect employees who have already gone to the Office of Special Counsel (OSC) on an alleged personnel practice, with some modifications. We urge the Committee to add a new provision providing 15 calendar days for all employees to respond to the Secretary, should they believe an action taken against them as a result of this legislation is a prohibited personnel action. Current statute requires “at least 30 days’ advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed” (5 U.S. Code § 7513). We propose cutting this time in half to expedite the process but to still allow a short period of time for an employee to respond to the action. If the agency believes the person is a threat to other employees or there are other reasons to order removal from the workplace, the Secretary can place the individual on paid administrative leave during this time – with strict limits on how many days of paid leave are possible. During those 15 days, the employee should also be allowed to take their complaint to OSC.

Since a proposed removal or demotion of an employee in Section 2(f) would need to be approved by the Office of Special Counsel before it could be taken, we also suggest that the language be amended to place a time limit on how long OSC has to approve or disapprove a proposed removal or demotion. The bill

should also provide a standard to use to determine whether or not to approve the proposed action. Such a standard, for example, might include a finding by OSC that there are reasonable grounds to believe that the proposed action is a prohibited personnel action (including reprisal for whistleblowing). Of course, it will also be important to ensure that OSC has the resources it needs to handle any new responsibilities. This Committee could ask GAO to do a quick study of the resources OSC would need to meet specific time frames.

### *Expedited MSPB Review*

Section 2 also includes an expedited appeals process to MSPB. While we are pleased to see some due process protections in the bill from the outset, we do have concerns about the ability of MSPB to review cases within 45 days without additional resources, particularly since they could see an increase in appeals under the proposed changes. In the Partnership's *Building the Enterprise: A New Civil Service Framework*,<sup>5</sup> we call on Congress to expedite the appeals process and argue that MSPB should issue decisions in 90 days. While there should be a mechanism in place to ensure a timely appeal process, as noted in a recent MSPB report, *What is Due Process in Federal Civil Service Employment*,<sup>6</sup> federal employees no longer receive pay and benefits once a removal action is taken and an appeal is pending. We believe some of the pressure to shorten the time MSPB has to issue a decision is based on an erroneous belief that a terminated employee continues to receive their federal salary while the appeal is pending. The fact that a federal employee is not receiving compensation during the appeals process, therefore, should be taken into account. We are also concerned that the bill strips further appeal rights to the courts. We believe this provision is unduly punitive since the employee will have been removed and the government would be at risk only if the courts determine that it acted wrongly. While we agree the process should be streamlined, it is important to choose a timeframe that also allows for a thorough review before a decision is issued. In the case of alleged whistleblower retaliation, for example, we believe it would be difficult for MSPB to resolve issues that typically arise in this type of allegation in 45 days. Congress could ask GAO to assess the resources necessary for MSPB to do such an expedited review.

### *Probationary Period*

Section 3 makes some changes to the probationary period for employees at VA. The language requires employees to serve a probationary period of at least 18 months, which may be extended at the discretion of the Secretary. The Partnership recognizes that there may be value in some cases to having a longer probationary period (e.g., in the case of lengthy training) but we think the emphasis should be on making good use of the probationary period not just on the length.

The probationary period provides an opportunity for managers to help develop high-potential employees. It also gives them a chance to remove poor performers more easily. During this period, all employees should have access to training and should receive regular feedback from their supervisor to give them the best opportunity to succeed. However, employees who have not demonstrated the management and technical competencies needed to perform well in his or her role in the organization should be removed.

We were very pleased that S. 1082 and the House companion legislation, H.R. 1994, include language which would require an employee's supervisor to make a clear decision at the end of the probationary period as to whether or not the employee would continue past the probationary period or be removed from federal service. While this is a great first step, this provision applies only to employees who are new to

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<sup>5</sup> Partnership for Public Service and Booz Allen Hamilton, *Building the Enterprise: A New Civil Service Framework*, April 2014, <http://ourpublicservice.org/publications/viewcontentdetails.php?id=18>.

<sup>6</sup> Merit Systems Protection Board, *What is Due Process in Federal Civil Service Employment*, May 2015.

government. We urge the Committee to expand this language to make sure it applies to new supervisors in government who also serve a probationary period. We also recommend clarifying what happens if a supervisor does not take an action at the end of the probationary period. One option is to have the employee continue in a probationary status for a finite amount of time while a higher level of review is triggered.

*Ensuring Veteran Safety through Accountability Act of 2015 (S. 1117)*

This bill would expand recently enacted legislation making it easier to fire senior executives at the Department to include individuals appointed to the Veterans Health Administration. In addition, it would strike procedures under Sections 7461(b) (adverse actions) and 7462 (major adverse actions involving professional conduct or competence) of Title 38 and Sections 7503 (cause and procedure) and 7543(b) (cause and procedure) of Title 5 in addition to the current law which says that procedures under Section 7543(b) (cause and procedure) of Title 5 do not apply.

Similar to the legislation previously discussed, we are concerned that this language does not provide employees with sufficient due process protections other than expedited appeal rights to MSPB after a removal has taken place. In short, it does not protect the public interest in a civil service free of prohibited personnel practices, including reprisals against whistleblowers. We recommend the Committee include language that gives employees an expedited opportunity to respond to the action. At the same time, the individual should have the ability to get a quick decision from the Office of Special Counsel as to whether there is reasonable cause to believe that the termination or demotion proposed constitutes a prohibited personnel practice and, therefore, the action should be stayed until a further review is made.

While MSPB to date appears to have been able to handle its new responsibilities within its current resources, we remain concerned that a truncated appeals process – a 21-day expedited review in this case – could easily exceed MSPB’s capabilities if these provisions are expanded to all VHA employees, and especially if it is adopted on a government-wide basis. Between FY 2009 and FY 2014, a total of 62,965 employees were terminated (fired) for conduct or performance across government. The Department of Veterans Affairs accounted for 13,969 of those 62,965 terminations.<sup>7</sup> If this is expanded government-wide, it would have significant implications for MSPB.

## **Conclusion**

Mr. Chairman and members of the Committee, thank you for the opportunity to appear before you today. This is a very important issue that deserves the time, attention and understanding that you are devoting to it. The Partnership stands ready to help.

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<sup>7</sup> FedScope (fedscope.opm.gov), from the Office of Personnel Management, for federal civilian employees at most executive branch agencies who were terminated or removed due to discipline or performance during fiscal 2009-2014.